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283-268—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 772

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) has not yet been officially reported. The Board's decision and order (Pet. App. 25a–58a) are reported at 159 NLRB No. 145.

JURISDICTION

The decree of the court of appeals was entered on August 31, 1967 (Pet. App. 14a–17a), and a petition for rehearing was denied on September 25, 1967 (Pet. App. 23a–24a). The petition for a writ of certiorari was filed on October 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In 1951, the Board certified the union as the representative of a unit composed of professional and non-professional employees, without first having a separate vote of the professional employees taken to determine whether they desired inclusion in the mixed unit, as provided for in Section 9(b)(1) of the National Labor Relations Act. For more than 13 years thereafter, the employer recognized and bargained with the union as the representative of the professional and non-professional employees in that unit, and entered into successive collective bargaining agreements with the union. The following questions are presented:

1. Whether the Board properly concluded that the employer violated its duty to bargain when, in the midst of negotiations for a new contract, it withdrew recognition from the union on the ground that the original 1951 certification was invalid.[1]

2. Whether there is substantial evidence to support the Board's finding that the employer, when it withdrew recognition, did not have a good faith doubt that the union continued to represent a majority of the employees in the mixed unit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in Appendix B to the petition (pp. 101a–102a).

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[1] The same question is presented in the companion case of *Professional Employees of I.T.T. Federal Laboratories, et al.* v. *McCulloch, et al.*, No. 773, this Term.

STATEMENT

Since 1946, I.T.T. Federal Laboratories, a division of petitioner and its predecessor, Federal Telecommunications Laboratories, Inc.[2] (all herein referred to as the "Company"), has bargained with the representatives of a unit of its employees composed of engineers, chemists, and laboratory technicians employed at the Nutley, New Jersey, plant. *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395, 1396.[3] In 1950, Local 400, International Union of Electrical, Radio & Machine Workers, AFL–CIO ("Local 400") petitioned the Board for certification as the exclusive bargaining representative of the engineer-technician unit. The existing bargaining representative (Local 231, see note 3, *supra*) intervened in the proceeding. At that time, there were approximately 150 engineers and chemists, and 60 technicians in the unit. Both Local 400 and Local 231 maintained that the technicians should be retained in the unit on the ground that they were "professional" employees within the

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[2] In 1951, I.T.T. Federal Laboratories was organized by its parent corporation, International Telephone & Telegraph Corporation, to assume operation of the Nutley, New Jersey, plant involved herein. Prior to 1951, this plant had been operated by Federal Telecommunications Laboratories, a wholly-owned subsidiary of International Telephone and Telegraph (Pet. App. 59a, 60a, n. 4).

[3] The "engineer-technician" unit was first found appropriate in 1945. *Federal Telecommunications Laboratories, Inc.*, 63 NLRB 947, 953–954. No bargaining representative was chosen at that time, but in 1946 the United Office and Professional Workers of America, Local 231 was chosen by the employees and certified as the exclusive bargaining representative of that unit. *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395, 1395–1396.

meaning of Section 2(12) of the Act (29 U.S.C. 152(12)), or, alternatively, were highly skilled employees whose work was completely integrated with that of the engineers and chemists. The Company, however, contended that the technicians were not "professional" employees, that they had a closer community of interest with the employees in the production and maintenance unit, and that, therefore, they should be excluded from the engineer unit.

In the ensuing representation proceeding (*Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395), the Board concluded that, "[u]nder the circumstances, we need not decide whether technicians are professional employees within the meaning of the statutory definition," for, "[a]s all the parties are agreed that the engineers and chemists are professional employees, and the record clearly shows that [the engineering unit] * * * is composed *predominantly* of professional employees within the meaning of Section 2(12) [of the Act] * * *, the technicians may appropriately be included in the professional voting group" (92 NLRB at 1398–1399). Accordingly, the Board conducted an election in the engineer-technician unit, Local 400 received a majority of the votes cast, and was certified as the exclusive bargaining representative of that unit (R.P. 108a, 42a).[4]

In 1951, 1952, 1954, 1956, 1959, and 1961, Local 400 and the Company entered into a series of collective bargaining agreements covering the engineer-techni-

[4] "R.P." refers to petitioner's appendix filed with the court below and "R.B." to the Board's appendix.

cian unit, the last of which expired on September 9, 1964 (R.P. 109a, 43a; R.B. 4b–8b, 11b–12b; G.C. Exhs. 2–A, B, C, 3–C, 4, 5, 6, 13). The 1964 negotiations, which are described below, failed to produce a new agreement and a strike ensued (R.P. 67a; R.B. 72b).

In January 1964, while the 1961–1964 contract was still in effect, Local 400 requested that the Company furnish it with seniority data as to non-unit personnel who might be transferred into the engineer-technician unit (R.P. 45a; 147a–149a, 153a–154a, 333a–334a). The Company refused to supply such information, notifying Local 400 that it would only make available information relating to employees already transferred, and that this information would be published in the Company's semi-monthly personnel bulletin (R.P. 45a–46a; 149a, 150a, 153a–154a). In June 1964, Local 400 also requested that it be provided with the evaluation factors used by the Company in determining which employees in the engineer-technician unit would receive the semi-annual merit increases (R.P. 155a, 157a–158a, 295a–296a).[5] The Company refused to supply that information as well (R.P. 115a; 155a, 344a; R.B. 14b).

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[5] The 1961–1964 contract called for the creation of a fund from which the semi-annual merit increases would be allocated (R.P. 115a, 51a; R.B. 12b, 82b). As to two-thirds of the fund, the Company was required to discuss its proposed allocations, but, if no agreement could be reached as to the recipients, the Company was authorized to put its recommendations into effect (R.P. 115a; R.B. 82b–83b). As to the remaining one-third, union agreement was required, and unresolved disputes were to be submitted to arbitration (R.P. 115a; R.B. 13b, 83b).

Negotiations for a new collective bargaining agreement began on July 20, 1964 (R.P. 63a, 65a; 165a). In the ensuing bargaining sessions, the Company contended that contracts were being lost to competitors because the cost of its fringe benefits was comparatively higher (R.P. 66a, 71a; 171a–172a, 177a–178a, 179a, 212a). Local 400 requested information as to the relation between fringe benefits and the bidding on new contracts, and as to contracts which had been lost because of high fringe benefits (R.P. 71a–74a; 177a–178a; 179a, 211a–212a, 215a–216a, 369a–375a). The Company did not supply such information (R.P. 71a–73a; 180a–181a, 375a). On September 9, 1964, at the expiration of the existing contract, Local 400 called the employees out on strike (Pet. App. 62a).[4]

On October 7, 1964, counsel for certain employees in the engineer-technician unit filed a petition with the Board seeking a decertification election in that segment of the unit which included the engineers, chemists, and spectroscopists, but excluding the technicians and all other employees (R.P. 110a, 44a; 366a, 402a). On the next day, the Company formally withdrew recognition from Local 400 as the representative of the engineer-technician unit, refused to bargain any further with that union insofar as the professional employees were concerned, and filed two representation petitions with the Board (R.P. 110a; 366a, 367a–368a,

[4] On July 19, 1964, Local 400 had filed an unfair labor practice charge with the Board, alleging that the Company had refused to bargain in good faith (R.P. 41a; 8a).

404a, 406a).[7] At the time of its withdrawal of recognition, the Company's records showed that 244 of a total of 460 employees in the engineer-technician unit were still on strike (R.P. 110a; 56a, n. 21; 314a–315a).

In light of these facts, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish Local 400 with (1) seniority data on non-unit personnel eligible for transfer into the bargaining units; (2) merit-review evaluation data relied on by the Company in determining the recipients of the semi-annual merit increases; and (3) financial and other data bearing on the Company's bargaining claim that the high cost of existing employee benefits was affecting its competitive position and causing it to lose contracts (Pet. App. 27a–29a, 37a–38a, 63a–69a). It further found that the Company solicited two employees to abandon the strike, by means of threats and promises, in violation of Section 8(a)(1) of the Act (Pet. App. 38a–39a, 70a–72a). Finally, the Board (with two Members dissenting) found that the Company violated Section 8(a)(5) and (1) of the Act by conducting negotiations with Local 400 in bad faith in order to avoid reaching an agreement (Pet. App. 37a, n. 16, 87a–88a), and by withdrawing recognition from Local 400 as bargaining representative of the professional employees in the engineer-technician unit (Pet. App. 29a–37a).

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[7] One petition sought an election among the same employees set forth in the decertification petition previously filed, and the other an election in the entire unit (Pet. App. 32a–35a; R.P. 404a, 406a). All three petitions were dismissed by the Board because of the pendency of the unfair labor practice proceeding (Pet. App. 33a, n. 13).

In arriving at the latter conclusion, the Board assumed, *arguendo,* as the Company contended, that the original 1951 certification of Local 400 was invalid because the professional employees were never accorded a separate vote on whether they wanted to be included in the mixed unit, as Section 9(b)(1) of the Act requires (Pet. App. 33a).[8] The Board held that Section 9(b)(1), "although precluding *the Board* itself from initially establishing such a mixed unit in a representation proceeding without a self-determination election, does not preclude an *employer and a union* from voluntarily establishing and maintaining such a unit as one appropriate for collective bargaining" (Pet. App. 34a). Thus, the Board found that the Company, in the intervening 13 years, had developed a consensual bargaining relationship with the mixed unit, and that this factor, coupled with the timing and context of the Company's attempt to withdraw recognition from that unit, estopped it, at that time, from disputing the appropriateness of the unit (Pet. App. 36a–37a).[9]

Accordingly, the Board ordered the Company to cease and desist from the unfair labor practices found; to make available the seniority, merit-review, and

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[8] Section 9(b)(1) provides that "[t]he Board shall not decide that any unit is appropriate for [collective bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *."

[9] The Board specifically noted that its holding did not foreclose the professionals in the unit from seeking a self-determination election under Section 9(b)(1) at an appropriate time after the Company's unfair labor practices had been remedied (Pet. App. 36a, n. 15).

financial and other data previously withheld; and, upon request, to bargain collectively with Local 400 (Pet. App. 39a–42a).

The court of appeals agreed with the Board that the parties, in light of their post-1951 relations, had consented to the appropriateness of a mixed bargaining unit consisting of professional and non-professional employees; and hence that, in the particular circumstances of this case, whatever defect had existed in the original 1951 certification did not justify the Company's present refusal to bargain with Local 400 (Pet. App. 4a–5a). The court below, with minor modifications not pertinent here, sustained the Board's unfair labor practice findings and enforced its order (Pet. 13a).[10]

ARGUMENT

1. The facts summarized in the Statement (*supra*, pp. 3–7) show that, for more than 13 years, the Company recognized and bargained with Local 400 as the representative of the employees in a unit which contained both professional and non-professional employees, and entered into a series of collective agreements with Local 400 covering that unit; that, at the outset of the 1964 contract negotiations, the Company

[10] The court modified that portion of the Board's order requiring the Company to provide Local 400 with blanket seniority data of non-unit personnel. As modified, however, the Company was still required to disclose data on the seniority status of non-unit employees about to be transferred into the unit (Pet. App. 7a–9a). Except for the finding relating to the withdrawal of recognition of the union as the representative of the mixed unit, the Company does not here challenge the court's action in sustaining the Board's unfair labor practice findings.

continued to recognize Local 400 and the appropriateness of the engineer-technician unit; and that the Company did not withdraw recognition and challenge the composition of that unit until after Local 400 had called a strike and the Company itself had engaged in other unfair labor practices. The basic question presented by the instant petition is whether, in these unique circumstances, the Board properly concluded that the Act did not authorize the Company to terminate its bargaining relationship with Local 400 on the claim that the Board election in 1951, in which Local 400 first gained its representative status, was defective. So viewed, it seems clear that the Board's resolution of this narrow question is correct and presents no issue of continuing importance warranting review by this Court.

As the court below pointed out (Pet. App. 4a), although "section 9(b)(1) prohibits the Board from designating a mixed unit without holding the requisite election of professionals, nothing in the language of the Act prohibits the relevant parties from maintaining and recognizing such a unit consensually."[11] See *Retail Clerks Union Local 324* (*Vincent Drugs*), 144 NLRB 1247. Although Local 400's initial representative status, on behalf of the mixed unit, stemmed from the 1951 Board election and certification,[12] the record

[11] It is clear that a bargaining relationship and obligation may be established by means other than a Board election and certification. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71–72.

[12] Even before 1951 an engineer-technician unit had existed, and the Company had bargained with another union which then represented the employees included in that unit (*supra*, p. 3).

shows that at no time betwen 1951 and 1964 did either the Company or the professional employees challenge the composition of the unit or seek its decertification. Rather, the Company continued to recognize Local 400 as the bargaining representative for the mixed unit,[13] and entered into a series of collective agreements with it—thereby explicitly acknowledging the acceptability to the Company of the mixed-unit representation. In these circumstances, as the court below found (Pet. App. 5a), the Board was justified in concluding that the parties had established "a consensual arrangement" here, and that therefore "the error in the original determination of the bargaining unit does not justify the present refusal to bargain with it."

Leedom v. *Kyne*, 358 U.S. 184, does not require a contrary conclusion. In that case, the Court held that the district court had jurisdiction of a suit brought by a union of professional employes to set aside the Board's action in certifying that union as the representative of a mixed unit of professional and non-professional employees, where the Board had not afforded the professionals a separate vote on whether they desired inclusion with the non-professionals, as contemplated by Section 9(b)(1). Noting that the Board did not contest the trial court's conclusion that it "had acted in excess of its powers and had thereby worked injury to the statutory rights of the professional employees" (358 U.S. at 187), the Court con-

[13] This recognition continued even after the 1958 decision in *Leedom* v. *Kyne*, 358 U.S. 184, discussed *infra*, as noted by the court below (Pet. App. 5a).

cluded that the suit could be maintained, for "'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means within their control * * * to protect and enforce that right" (*id.* at 190).

Here, on the other hand, the Board did not rely on the original certification of Local 400, which arguably is defective under Section 9(b)(1), but on the fact that the parties, by their conduct over the years, have substituted for that certification a consensual bargaining relationship which is not necessarily subject to the restrictions of that section. Moreover, unlike *Kyne,* the Board's holding that the Company may not at this time withdraw recognition from Local 400 does not have the effect of obliterating the right of the professional employees to vote on whether they wish to be in a unit that includes non-professionals. The Board specifically noted (Pet. App. 36a, n. 15) that its decision "is not to be construed as foreclosing the professionals in the unit from seeking self-determination at an appropriate time and in the appropriate proceeding." Although the Board added that (*ibid.*) "now is not an appropriate time," that is only because the Company has committed unfair labor practices which must be remedied before a fair election can be held.[14]

2. Petitioner further contends (Pet. 11–12) that its withdrawal of recognition from Local 400 was in any

[14] It is within the Board's discretion to defer the holding of an election until unfair labor practices which could have an effect on the election have been remedied. See *Suprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396 (C.A. 1).

event justified because it had a good faith doubt that Local 400 continued to represent a majority of employees. This presents only an evidentiary issue which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. Moreover, as the court below concluded (Pet. App. 5a–6a), there was ample support for the Board's finding that the Company did not have a good faith doubt as to Local 400's majority status.[15]

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[15] The cases cited by petitioner (Pet. 11) are inapposite. For example, *United States Molded Shapes*, 141 NLRB 357, involved a first attempt to establish a bargaining relationship, upon the union's demand for recognition and claim of majority status. In such a situation it is incumbent on the General Counsel to prove that the union did in fact represent a majority of the employees. But where, as here, the employer withdraws recognition from an existing bargaining representative, he must show a reasonable basis for his asserted good faith belief that the union no longer represents a majority of the employees. *Celanese Corporation of America*, 95 NLRB 664, 671–675, cited with approval in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 104; *National Labor Relations Board* v. *Gulfmont Hotel Co.*, 362 F. 2d 588, 589 (C.A. 5). In the instant case, petitioner not only failed to adduce any evidence that it had a good faith doubt of Local 400's majority, but the record shows that it was aware that, at the time it withdrew recognition, a majority of the employees supported the strike (*supra*, pp. 6–7).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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